FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
NO. 79-1238

ANTHONY BRIGGS,

Petitioner,

- vs -

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOSEPH A. MILCHEN
ROBERT A. BALL
225 Broadway,
Suite 1755
San Diego, CA 92101
Telephone: (714) 239-1888

Attorneys for Petitioner

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Attorneys for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO._____

_____

_____

ANTHONY BRIGGS,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

_____

_____

_____

The petitioner, Anthony Briggs, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 13, 1979.

OPINION BELOW

On November 13, 1979 the Court of Appeals, in a memorandum decision, affirmed the denial of petitioner's request for voluntary departure pursuant to Title 8 United States Code § 1254(e) by the Immigration & Naturalization Service and

Board of Immigration Appeals. A copy of the memorandum is attached hereto as Appendix "A" and herein incorporated by reference.

JURISDICTION

On November 13, 1979, the Court of Appeals for the Ninth Circuit entered judgment affirming the denial of discretionary relief to the petitioner by the Immigration and Naturalization Service. On January 7, 1980 the Court of Appeals denied petitioner's petition for rehearing and suggestion for rehearing en banc. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether exclusive reliance upon an unsigned, unsworn triple hearsay document without notice of the charges contained therein denied petitioner due process of law and his right to cross-examine?

CONSTITUTIONAL STATUTORY AND REGULATORY PROVISIONS INVOLVED

The constitutional, statutory and regulatory provisions outlined below are

involved in the instant case.

The Fifth Amendment to the United States Constitution provides in relevant part: "[N] or shall any person . . . deprived of life, liberty or property without due process of law."

The Immigration and Naturalization Act, Title 8, United States Code, Section 1254(e) provides in pertinent part:

> The Attorney General may in his discretion, permit any alien under deportation proceedings, . . . to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection."

The Immigration and Naturalization Act, Title 8, United States Code, Section 1252(b) provides in pertinent part:

> Proceedings before a special inquiry officer acting under the provision of this section shall be in accordance with such regulations, not incon-

sistent with this Chapter as the Attorney General shall prescribe. Such regulations shall include requirements that--

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him. . . .

Administrative regulations of the Immigration and Naturalization Service, 8 Code of Federal Regulations, Section 242.1(a) and (b) provides:

(a) Every proceeding to determine the deportability of an alien in the United States is commenced by the issuance of an order to show cause by the Service. . . .

(b) The order to show cause will contain a statement of the nature of the proceeding, the legal authority under which the proceeding is conducted, a concise statement of factual allegations informing the respondent of the acts or conduct alleged to be in violation of the law and a designation of the charges against the respondent and of the statutory provisions alleged to have been violated . . . .

STATEMENT OF THE CASE

Petitioner Briggs is an overstay

non-immigrant who admitted deportability pursuant to Section 241(a)(2) of the Immigration and Naturalization Act, Title 8, United States Code, Section 1251(a)(2).

On November 28, 1978 Briggs while found to be a person of good moral character pursuant to Title 8 United States Code, §1254(e), was ordered deported and denied voluntary departure. A copy of the oral order duly transcribed is attached hereto as Appendix "B".

The Petitioner filed a timely Notice of Appeal to the Board of Immigration Appeals on December 4, 1978, appealing the denial of voluntary departure.

On January 22, 1979, the Board of Immigration Appeals issued an order dismissing the Petitioner's appeal, a copy of which is attached hereto as "Appendix C ".

On February 7, 1979 a Petition for Review was timely filed in the United States Court of Appeals for the Ninth Circuit. On November 13, 1979, the Court of Appeals for the Ninth Circuit affirmed the denial of discretionary relief, (see "Appendix A"), rehearing denied and suggestion for rehearing en banc rejected January 7, 1980.

A Motion to stay the mandate reflecting the judgment of January 7, 1980 for a period of thirty days to allow preparation of this petition was filed on January 14, 1980.

STATEMENT OF FACTS

At his deportation hearing, Petitioner, a citizen of Great Britain, admitted deportability as an overstay non-immigrant but sought discretionary relief from deportation in the form of voluntary departure, pursuant to Section 244(e).

Evidence adduced at the deportation hearing demonstrated Brigg's eligibility for relief in accord with the statutory pre-requisites, his ability to pay his travel expenses outside the United States, and his good moral character.

Notice to the Petitioner of the charges for deportation were contained in an Order to Show Cause attached at Appendix "D". However, at the hearing and at first instance the government introduced the sole adverse evidence to the Petitioner: an unsigned, unsworn four page document identified as an F.B.I. report. The report alleged that according to information supplied to the legal attache, London, by letter from the South Yorkshire Police

Department, outstanding criminal charges were pending against petitioner in Great Britain. No effort was made by the Immigration Service to obtain documentary verification of pendency of foreign court proceedings.

Petitioner's counsel, while stipulating to use of the report for limited purposes, objected to introduction of the report to show the truth of any allegations contained therein in that no formal record of the proceedings in England was presented for the petitioner's review at the hearing. The objections were overruled and the report was admitted into evidence.

Based upon this report, as the sole evidence on the question, the Immigration Judge denied discretionary relief and found that while Briggs was a person of good moral character, he was a "fugitive from justice" who displayed "disrespect for the legal process in his homeland."

REASONS FOR GRANTING THE WRIT

In view of the lower court's decisions which is inconsistent with this Court's previous decisions and in light of conflict decisions in the Circuit Courts of Appeals,

the Supreme Court must elucidate the basic principles inherent in the right to cross-examination and due process of law applicable to notice of charges and evidence to be used, and the use of hearsay in administrative proceedings.

In Goldberg v. Kelly, 397 U.S. 254 (1970), this Court held due process requirements of adequate notice and an opportunity to be heard were applicable to administrative proceedings. Consistent therewith the Immigration and Naturalization Act, Title 8 United States Code 1252(b)(1) and administrative regulations promulgated thereunder, 8 Code Federal Regulations 242.1, require a concise statement of factual allegations informing the respondent of the acts or conditions alleged to be in violation of the law.

The decisions of the Courts of Appeals interpreting the notice requirements of agency proceedings pursuant to the Immigration and Naturalization Act are ambiguous and in conflict on the question.

Consistent with the ruling of the lower court in the instant case, the Court of Appeals for the Tenth Circuit held in Auland v. Marshall, 461 F.2d 710 (10th Cir., 1972), that while it would have been

preferable to allege charges which were the basis for the government's opposition to discretionary relief, the allegations were not constitutionally required.

The Third Circuit, although not directly ruling on the issue, has held that the serverity of harm visited by deportation requires notice of all charges in a manner not unlike criminal proceedings. Chlomas v. United States Department of Justice, Immigration and Naturalization Service, 516 F.2d 310 (3rd Cir., 1975).

This Court has held adequate notice is the first and foremost pre-requisite of a fair hearing, In re Oliver, 333 U.S. 247 (1948), and has further found that because deportation may result in the". . . loss of all that makes life worth living , meticulous care must be exercised lest the procedure by which [an individual subject to deportation] is deprived of that liberty not meet the essential standards of fairness." Bridges v. Wixon, 236 U.S. 135, 144 (1945). There this Court ruled hearsay statements inadmissable as violative of due process, particularly in view of lack of adherence to administrative regulations. The court held a higher standard of procudural due process was

applicable to deportation cases where the "rights of aliens whose roots have become fixed in this land are involved," Bridges v. Wixon, supra, at 134, than in ordinary administrative matters where relaxation of evidentiary rules is permitted.

In Richardson v. Perales, 402 U.S. 389 (1971) this Court permitted the use of a hearsay physician's report in the context of a social security disability hearing, where after notice of the document, the claimant failed to exercise his right to subpoena the declarant. In permitting use of the hearsay document, this Court recognized that the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss.

Critical in the decision in Perales was the recognition of the traditional reliability of medical reports and the adequacy of notice, thereby affording the claimant the ability to subpoena the declarant for purposes of cross-examination. In the instant case, the document was unsigned, no notice was afforded and the unknown declarant had no personal knowledge of the facts. The information was provided by another unknown source relayed second

hand from a third party in Great Britain, who therefore could not be subpoenaed by Petitioner. No effort had been made by the Immigration Service to verify the alleged pending criminal proceeding. As in Bridges v. Wixon, supra, but for the hearsay evidence, it is wholly speculative whether the adverse finding would have been made.

The affirmance of admission, without notice, of hearsay of this type and quality by the Ninth Circuit Court of Appeals is in clear contravention of the principles of procedural integrity and fundamental fairness as required by this Court in both the Bridges and Perales decisions.

CONCLUSION

Based upon the foregoing, Petitioner submits it was highly prejudicial and violative of his rights to due process of law and cross-examination to allow the admission of a triple hearsay document without notice of the charges contained therein as the sole evidence upon which the denial of discretionary relief was based. It is imperative that this Court address the need for further definition of the requirements of procedural due

process in the context of the deportation process. Therefore, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

FRANK & MILCHEN
Attorneys at Law

JOSEPH MILCHEN

ROBERT A. BALL

RECEIVED
NOV 15 1979
FRANK & MILCHEN

FILED
NOV 13 1979
RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY BRIGGS,

Petitioner,

v.

IMMIGRATION & NATURALIZATION SERVICE,

Respondent.

No. 79-7054

MEMORANDUM

On Petition for Review of an Order of the Board of Immigration Appeals

Before: CHAMBERS, BROWNING and CARTER, Circuit Judges.

Briggs, a citizen of Great Britain, entered the United States as a non-immigrant visitor and over-stayed his authorized visit. At the hearing before the Immigration & Naturalization Service ("Service"), he admitted his deportability but asked for voluntary departure. He was found deportable and his petition for voluntary departure denied by an Immigration judge on November 28, 1978.

He appealed to the Board of Immigration Appeals, and his appeal was dismissed on January 22, 1979. His petition for review raises the question of whether the discretionary denial of his petition was correct.

At the hearing before the Immigration judge an F.B.I. document was received into evidence over Briggs' objection. Briggs' attorney then stated he had no objection to the document being admitted into evidence so long as it was considered only as showing Briggs' name, his physical description "and

FPI-Sandstone
8-23-71—10M—8046

the fact that the FBI has information that he is being charged with a certain crime in England." It was not error for the Immigration judge to consider the document to the extent Briggs' attorney stipulated.

Briggs testified that he made a voluntary appearance before an investigative official in Great Britain in conjunction with a charge of theft in late August or early September 1977, and that the police officials said they would want to see him again in the next five days, but he did not go back. Instead he "left for the States."

Briggs did not want to return to Great Britain. He first asked that Canada be designated as the country to which he would be deported, and when that could not legally be done, he designated France.

In denying the request for voluntary departure, the Immigration judge cited petitioner's status as a fugitive from justice, his disrespect for the legal process in his homeland, and his apparent unwillingness to leave the United States voluntarily.

Briggs testified he had never been arrested or convicted for any offense and that he had a good work record in the United States. The Board of Immigration Appeals noted he had been in the United States a relatively short time and had no family ties here.

The Board found that the favorable factors were outweighed by the unfavorable factors, his conduct in connection with the theft charge in England, i.e., that he had been told by the police that they wanted to talk to him again, but instead he left for the United States.

We find no abuse of discretion and the decision of the Board of Immigration Appeals is AFFIRMED.

FPI-Sandstone
9-23-71—10M—6046

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A23 029 403--San Diego, California — November 28, 1978

In the Matter of)
)
Anthony Briggs) IN DEPORTATION PROCEEDINGS
)
Respondent)

CHARGE: Section 241(a)(2), Immigration and Nationality Act - Nonimmigrant remained longer.

APPLICATION: Voluntary departure.

ON BEHALF OF RESPONDENT:
Robert A. Ball, Esquire
225 Broadway, Suite 1755
San Diego, California 92101

ON BEHALF OF SERVICE:
Harold J. Neubauer, Esquire
Trial Attorney/INS
San Diego, California 92188

DECISION OF THE IMMIGRATION JUDGE

The respondent is a 36 year old single male alien, a native and citizen of Great Britain.

In the deportation hearing, the respondent through counsel admitted the truth of the factual allegations in his Order to Show Cause (Exhibit 1) and conceded deportability as charged. Based on these admissions, I am satisfied that deportability is shown by clear, convincing and unequivocal evidence.

The respondent has made an application for voluntary departure. It does appear that he has had filed on his behalf a six-preference visa petition with the Immigration and Naturalization Service office in Los Angeles. It also appears that this petition has not yet been located and no favorable action has been taken on it. In the absence of an approved six-preference petition, the respondent would be ineligible to apply for adjustment of status pursuant to Section 245 of the Immigration and Nationality Act. The only other relief from deportation under the facts presented would be voluntary departure and the respondent has requested this relief.

APPENDIX "B"

The respondent has no close family ties in the United States. He states that he has never been arrested nor convicted of any crime and that he has the necessary funds to pay his way outside the country and that he is willing to leave voluntarily. The Service opposes voluntary departure pointing to facts surrounding an incident involving the respondent in Great Britain which took place the last days of August or early September in 1977.

At that time the respondent was apparently employed by a corporation. He was under investigation under what appears to be a theory that he embezzled a sum of money from the company. He states that he voluntarily appeared before a company officer and a police official in the company offices and was interviewed and he was later told to appear at the police station to give a statement. He gave the statement to the police authorities and then was told by them that he would be requested to appear again in a few days. Instead of appearing, the respondent left Great Britain for the United States arriving here on September 8, 1977. He claims that he made arrangements for this trip before his difficulty began with his employer.

(Exhibit 2) is an FBI report which shows the efforts made by that agency to locate the respondent. It appears that the FBI was attempting to locate him because he had been charged in England with the theft of approximately $8000. The respondent denies that he is guilty of any such crime. He does state, however, that he felt that he was being victimized by the entire circumstances and that he would not receive justice in his homeland. He arrived in the United States and shortly thereafter obtained a California driver's license (See Exhibit 2). He also obtained employment with a California car dealership and his employer in early October, 1977, filed a six-preference petition for him.

In order to qualify for voluntary departure, the respondent must establish that he is now and has been a person of good moral character for at least the past five years, that he is willing to depart the United States voluntarily, that he is willing to pay his own transportation costs outside of the United States and that he is worthy of voluntary departure in the exercise of discretion (Section 244(e) of the Immigration and Nationality Act). Under the statute, several catagories of misconduct are set forth which would prohibit a showing of good moral character (Section 101(f) Immigration and Nationality Act). It does not appear that the respondent falls within any of the catagories set forth. He has stated he has the financial resources to pay his travel expenses outside of the United States and, as stated above, it appears that he is a person of good moral character. The remaining issues presented is whether he intends to depart the United States voluntarily and whether he deserves this relief in the exercise of discretion.

I realize that voluntary departure is the minimal relief available in a deportation hearing. Still the respondent must clearly establish before me that he deserves this relief in the exercise of discretion. After careful consideration of all the facts herein, I find that he does not deserve voluntary departure I am convinced that the respondent is a fugitive from justice. He admits that he was told by the police authorities in his homeland to appear before them several days after he made his statement. Instead of doing that he departed for the United States. He did not notify the police authorities of his departure. He arrived in this country and shortly thereafter obtained a California driver's license. His employer filed paperwork in order to legalize his status in this country as an immigrant. His disrespect for the legal process in his homeland is, in my opinion, an adverse factor which should weigh against his application

for relief. He has no close family ties in the United States and he has been in the country only a short period of time. On the facts presented, I am satisfied that he does not deserve the relief he seeks and I am also not convinced that he is willing to leave the United States voluntarily.

The following order will now be entered:

ORDER: IT IS ORDERED that the application for voluntary departure be denied.

IT IS FURTHER ORDERED that the respondent be deported from the United States to France on the charge of deportability set forth in his Order to Show Cause.

IT IS FURTHER ORDERED that if the afore named country advises the United States Attorney General that it is unwilling to accept the respondent into its territority or fails to advise the Attorney General within three months following original inquiry whether it will or not accept him into its territory, then the respondent shall be deported to Great Britain.

Robert J. Barrett
ROBERT J. BARRETT
Immigration Judge

United States Department of Justice
Board of Immigration Appeals
Washington, D.C. 20530

JAN 22 1979

File: A23 029 403 - El Centro

In re: ANTHONY BRIGGS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert A. Ball, Esq.
225 Broadway, Suite 1755
San Diego, CA 92101

ON BEHALF OF I&N SERVICE: Harold J. Neubauer
Trial Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) - Nonimmigrant visitor - Remained longer than permitted

APPLICATION: Voluntary departure

On November 28, 1978, an immigration judge found the respondent deportable as charged, denied his request for voluntary departure, and ordered him deported. The respondent has appealed the denial of voluntary departure. The appeal will be dismissed.

The respondent is a 36-year-old male native and citizen of Great Britain. On September 8, 1977, he was admitted to the United States as a nonimmigrant visitor authorized to remain until October 31, 1977. He failed to depart as required. At his hearing, he admitted the allegations in the Order to Show Cause and conceded deportability. Accordingly, deportability is not in issue on appeal.

APPENDIX "C"

In connection with the respondent's request for voluntary departure, an FBI report concerning him was admitted into evidence. The report related that the legal attache, London, had advised by letter dated October 20, 1977, that the respondent was wanted for theft of approximately 4,271 pounds (approximately $8,000); that he had failed to appear in Magistrates Court on October 4, 1977; that on October 4, 1977, a warrant for his arrest was issued; and other miscellaneous information including a physical description of the respondent.

When questioned by the immigration judge regarding admission of the report into evidence, the respondent admitted that the report related to him and acknowledged that there was a criminal charge pending against him in England. He testified that he was questioned by police regarding the incident and that they advised him that he would be questioned again. Thereafter, he left Great Britain and came to the United States.

The respondent did not object to the report on the ground that he was denied the opportunity to cross examine its author and he made no demand for production of the author. However, he objected to the implication in the report that he committed the offense for which he is wanted and challenged the report as inaccurate with respect to his use of an alias and the points of departure from England and arrival in the United States.

In his appeal the respondent contends that admission of the FBI report denied him due process of law in that he was denied the right to cross examine the author of the report. He also contends that the immigration judge's denial of voluntary departure was an abuse of discretion.

Initially, we find that the FBI report was admissible in evidence. Hearsay is admissible if probative and its use is fundamentally fair. Hoonsilapa v. INS, 575 F.2d 735 (9 Cir. 1978); Marlowe v. INS, 457 F.2d 1314 (9 Cir. 1972); Mormano V. Pilliod, 299 F.2d 217 (7 Cir. 1962), cert. denied 370 U.S. 924 (1962). The FBI report meets these tests. The report is probative evidence of the only fact for which we are considering it: that a criminal charge against the respondent is pending in England. That such a charge is pending is not in dispute: the respondent admitted it on the record. Even

if he had not made this admission, cross examination of the author of the FBI report could not have rebutted that information because its source was not the author of the report, but someone in law enforcement in Great Britain who relayed the information through the legal attache in London to the FBI.

The respondent had no absolute right to cross examine the author of the report. There is no statutory or constitutional requirement for a full hearing with all the evidence spread upon an open record with respect to considerations bearing upon a grant or denial of discretionary relief under section 244 of the Immigration and Nationality Act, 8 U.S.C. 1254. See Jay v. Boyd, 351 U.S. 345 at 353-355 (1956). In that case the United States Supreme Court upheld discretionary denial of suspension of deportation under section 244(a)(5) of the Act, 8 U.S.C. 1254(a)(5), although the denial was based on confidential information which was never disclosed to the respondent.

Finally, the respondent was not denied the opportunity to cross examine the author of the report. The record reflects that the respondent objected to admission of the report on grounds not relevant to this issue, but that he did not demand production of the author for cross examination or object to admission of the report on this basis. By his answers to the immigration judge's questions and by failing to demand production of the witness, the respondent waived his right 1/ to cross examine him. See U.S. ex rel. Impastato v. O'Rourke, 211 F.2d 609 (3 Cir. 1954), cert. denied 348 U.S. 827 (1954).

The immigration judge's discretionary denial of the privilege of voluntary departure was correct. In addition to statutory eligibility for voluntary departure, a respondent must establish that he is worthy of discretionary relief. 8 C.F.R. 242.17(d); Matter of Pimental, 12 I&N Dec. 50 (BIA 1967). The granting of voluntary departure is an act of administrative grace, and to warrant it there must be a showing of equities

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1/ 8 C.F.R. 242.16 provides a respondent a reasonable opportunity to examine and object to evidence against him, to present evidence, and to cross examine witnesses presented by the government.

over and above the factors going to statutory eligibility. Matter of Pimental, supra. We do not find such equities here.

In addition to the statutory requirements for eligibility, the respondent alleged that he has never been arrested or convicted of any offense, that he has had a good work record since he has been in the United States (he alleged that his employer had submitted a sixth preference visa petition in his behalf), 2/ and that he has not accepted public benefits while in the United States.

He has been in the United States a relatively short period of time (since September 8, 1977) and has no family ties here.

In our opinion, the favorable factors are outweighed by the facts that he is wanted on a theft charge in England and that he left his homeland after once talking to police in connection with the incident and being advised that they wanted to question him again. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Chairman

2/ The record does not reflect that his employment was authorized.

UNITED STATES DEPARTMENT OF J. TICE
Immigration and Naturalization Service No.

ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A23 029 403

In the Matter of Mr. Anthony BRIGGS Respondent.
c/o U.S. Immigration & Naturalization Service
Los Angeles, California
Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of England and a citizen of Great Britain;
3. You entered the United States at New York City, New York on or about September 8, 1977; (date);
4. You were admitted as a nonimmigrant visitor for a temporary period and authorized to remain in the United States until October 31, 1977;
5. You have not departed from the United States.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act in that, after admission as a nonimmigrant under Section 101(a)(15) of said Act you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at Service Processing Center, El Centro, California on November 30, 1978 at 9:00 a.m.
or sooner if possible at _____ m. and show cause why you should not be deported from the United States on the charge(s) set forth above.

DETAINED AT GOVERNMENT EXPENSE.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: November 22, 1978

(Signature and title of issuing officer)
ASSISTANT DISTRICT DIRECTOR, INVESTIGATIONS
LOS ANGELES, CALIFORNIA
(City and State)

RECEIVED
NOV 28 1978
LOS ANGELES

Form I-221S (Rev. 8-26-76)N (over)

55.

Record of HEARING of November 29, 1978 on SND 2-A-10.

APPENDIX "D"

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS EVIDENCE OF YOUR ALIEN REGISTRATION WHILE YOU ARE UNDER DEPORTATION PROCEEDINGS, THE LAW REQUIRES THAT IT BE CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity to present evidence on your own behalf, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

☐ Detained in the custody of this Service. ☐ Released on recognizance.

☒ Released under bond in the amount of $ 10,000.00

You may request the Immigration Judge to redetermine this decision.

☒ I do ☐ do not request a redetermination by an Immigration Judge of the custody decision.

(signature of respondent) 11/22/78 (date)

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

SUBJECT IS SATISIFIED WITH DATE AS SHOWN

(signature of respondent) NOV 28 1978 (date)

CERTIFICATE OF SERVICE

Served by me at Los Angeles, California on November 22, 1978 19 at 1740 m.

M. Lopez CHIEF

(signature and title of employee or officer)

56.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

Jan Hurst, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of San Diego County, California; that her business address is 225 Broadway, Suite 1755, San Diego, California, 92101; that she is over the age of eighteen (18) years, and not a party to the above-entitled action;

That on January 30, 1980, she personally served the following documents upon Wade H. McCree, Jr., Solicitor General, Department of Justice, 10th and Constitution Ave., N.W., Washington,

D.C., 20530 a copy of: Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

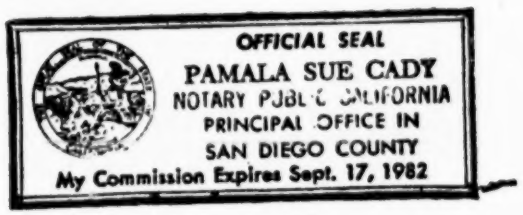
Jan Hurst

Jan Hurst

Subscribed and Sworn to
Before me this 30th
day of January, 1980.

Pamala Sue Cady

Notary Public in and
for Said County and
State



Supreme Court, U. S.
FILED
APR 19 1980
MICHAEL RODAK, JR., CLERK

No. 79-1238

In the Supreme Court of the United States

OCTOBER TERM, 1979

ANTHONY BRIGGS, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the denial of his application for voluntary departure from the United States deprived him of due process because it was based on hearsay information contained in an FBI report of which he had no notice prior to the deportation hearing.

1. Petitioner, a citizen of Great Britain, entered the United States on September 8, 1977, as a non-immigrant visitor and overstayed his authorized visit. On that ground, petitioner was served with a Notice of Hearing and Order to Show Cause why he should not be deported from the United States (R. 55).[1]

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[1] "R." refers to the certified administrative record.

At the hearing before an immigration judge, petitioner admitted deportability but requested voluntary departure (R. 39, 41). During questioning by the INS attorney, petitioner admitted to having had "an unfortunate financial experience" in Great Britain (R. 42). In response to the INS attorney's assertion that he had information regarding petitioner's involvement in a theft of 4,271 British pounds (approximately $8,000), petitioner admitted having been questioned about the matter by British police officers, having been informed by the police that they would want to talk to him again in a few days, and nevertheless having left for the United States before a second interview could take place (R. 44). Petitioner denied, however, having committed theft or having been formally summoned to appear in magistrate's court to answer a charge of theft (R. 42-45).

At that point in the proceedings, the government offered an FBI report into evidence (R. 45-46). The report stated that the FBI's legal attache in London had been advised by the South Yorkshire police department that petitioner was wanted for the theft of 4,271 British pounds, that he had failed to appear in magistrate's court on October 14, 1977, and that a warrant for his arrest had been issued on that date (R. 60). The report also stated that the South Yorkshire police were anxious to learn of any prosecutive or deportation action taken against petitioner since he would be arrested upon his return to Great Britain (*ibid.*). In response to the proffer, petitioner's counsel remarked (R. 47):

> we would have no objection to that document being admitted into evidence so long as it would only go to his listing of his true name, his physical description, other than his alias, and the fact that the FBI has information that he is being charged with a certain crime in England. We are in no way admitting that any of those allegations are true and correct.

The immigration judge admitted the report "[w]ith counsel's statement in mind" (R. 48).

Thereafter, petitioner denied that he had left Great Britain in order to avoid having to appear in connection with the theft charge. He asserted that his trip to the United States had been planned and that he had made airplane reservations before the financial matter arose. When asked why he had not delayed his departure in order to clear up the matter, petitioner responded that he felt he was being victimized and could accomplish nothing by staying. He also asserted that the matter was inflated, that he disputed the amount stated in the FBI report and that he was willing to make restitution for what he in fact owed (R. 48-49).

The immigration judge held that, in order to qualify for voluntary departure, petitioner had to establish that he had been a person of good moral character for at least the past five years, that he was willing to depart the United States voluntarily and at his own expense and that he was worthy of voluntary departure in the exercise of discretion (Pet. App. B 3). Petitioner's admission that he had departed for the United States without notifying the South Yorkshire police despite being advised that they would want to speak with him again convinced the immigration judge that petitioner was a fugitive from justice and that he was therefore neither willing to leave the United States voluntarily nor deserving of voluntary departure (*id.* B 3-4).

The denial of voluntary departure was upheld by the Board of Immigration Appeals (Pet. App. C). The court of appeals affirmed by memorandum order (Pet. App. A).

2. Petitioner's claim that the admission of the FBI report denied him due process is without merit. Contrary to petitioner's contention that the report was the "sole evidence" on which he was denied voluntary departure (Pet. 2, 6-7, 11), the opinion of the immigration judge clearly demonstrates that he relied instead on petitioner's own testimonial admissions, most of which were made prior to the introduction of the FBI report. Moreover, any claim that those admissions were made in response to the disclosure of the information contained in the report was waived by petitioner's stipulation that the report could be received to show that "the FBI has information that he is being charged with a certain crime in England."

In any event, the admission of the FBI report was not error. Voluntary departure is a form of discretionary relief (8 U.S.C. 1254(e)). It is an " 'act of grace' " that " 'cannot be demanded as a right.' " *Jay* v. *Boyd*, 351 U.S. 345, 354, 356 (1956). Therefore, the determination whether to grant voluntary departure is not governed by the strict rules of evidence. *Ibid.* Indeed, even in a case unlike this one, in which deportability is at issue, hearsay evidence may be admitted if it is probative and if its use is fundamentally fair. *Hoonsilapa* v. *INS*, 575 F. 2d 735, 738 (9th Cir. 1978). See generally *Morgano* v. *Pilliod*, 299 F. 2d 217, 219 (7th Cir.), cert. denied, 370 U.S. 924 (1962).[2] In light of the nature and source of the information contained in the FBI report and its substantial corroboration by petitioner's own testimony, these tests were clearly satisfied in this case.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980

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[2]Petitioner's reliance on *Bridges* v. *Wixon*, 326 U.S. 135 (1945), is misplaced. In that case, the Court held that an individual who had resided in the United States for 18 years could not be deported involuntarily on the ground of membership in the Communist Party on the basis of hearsay evidence admitted in violation of INS's own regulations. Here, the agency complied with its rules, and petitioner's "roots [have not] become * * * deeply fixed in this land." 326 U.S. at 154.

[3]There is no merit to petitioner's claim that the admission of the FBI report violated the notice requirement of the Due Process Clause. As petitioner recognizes, *Aalund* v. *Marshall*, 461 F. 2d 710 (5th Cir. 1972), expressly held that due process does not require INS to give notice of the grounds on which it intends to contest an application for voluntary departure. *Chlomos* v. *United States Department of Justice, Immigration and Naturalization Service*, 516 F. 2d 310 (3d Cir. 1975), which involved the right to the assistance of retained counsel at a deportation hearing, has no relevance to the present case.